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IN THE

Supreme Court of the United States

October Term, 1964

No. 378

HAROLD KANTER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

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PETITION FOR CERTIORARI

Harold Kanter, petitioner herein, prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Second Circuit, entered in this case on June 12, 1964, as adhered to by the order of said Court of Appeals entered July 22, 1964. The said order and judgment dated June 12, 1964 (Appendix A hereto) affirmed a judgment of conviction entered in the United States District Court for the Southern District of New York on January 23, 1964, which adjudged petitioner guilty of violation of 18 U.S.C. § 201 and sentenced him to a term of imprisonment of one year and one day. The order of the Court of Appeals entered July 22, 1964 (Appendix B hereto), denied a petition for rehearing *in banc*

tendered to said Court on July 13, 1964 together with an application seeking leave for such consideration of the same.

Opinions Below

There were no opinions in any court below.

Jurisdiction

The original judgment of the Court of Appeals was entered on June 12, 1964. On June 29, 1964 (the date when petitioner retained his present attorney), petitioner moved in said Court to stay or recall its mandate, to fix bail, and to permit an untimely petition for rehearing (petitioner's time therefor having expired on June 27, 1964). Said motion was denied in its entirety on July 6, 1964. On July 13, 1964, petitioner filed an application for reconsideration *in banc* of the said motion, also seeking leave for consideration of the merits of a petition for rehearing concurrently tendered to the Court. On July 22, 1964, the Court of Appeals, *in banc*, entered an order, denying said petition for rehearing, reading as follows: "A petition for a rehearing in banc having been filed herein by counsel for the appellant, Upon consideration thereof, it is Ordered that said petition be and hereby is denied."

On July 8, 1964, Mr. Justice Goldberg signed an order extending the time for filing a petition for a writ of certiorari in this cause to and including August 11, 1964.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). In particular, petitioner seeks review of the

order of the Court of Appeals dated July 22, 1964, adhering to its judgment affirming the petitioner's conviction of a criminal violation of a law of the United States.

Questions Presented

1. Whether, upon petitioner's trial on federal criminal charges in which he elected not to testify, the district court's failure to prevent the jury from repeatedly hearing a Minifon recording in which the petitioner could be heard making incriminating statements in his own voice, inflections and mannerisms, deprived petitioner of due process by committing plain error abridging petitioner's Fifth Amendment right not to be a witness against himself at the trial?

2. Where the district court permitted the jury to repeatedly hear a Minifon recording in which petitioner could be heard to incriminate himself in his own voice, inflections and mannerisms, was plain error committed by reason of petitioner's election not to testify at his trial, so depriving petitioner of due process as to call for the exercise of this Court's supervisory powers over federal courts and for the determination of questions not reached in *Lopez* v. *United States* (373 U.S. 427)?

3. Whether the district court, in refusing to grant petitioner's motion for a directed judgment of acquittal on the basis of entrapment as a matter of law, tended to deprive petitioner of liberty without due process where a federal Internal Revenue agent, commencing an investigation of untested allegations by petitioner's estranged wife as to

bribery of another agent, made unfounded imputations of liquor adulteration at petitioner's night club which petitioner contends was part of a course of provocative conduct designed to and which did induce petitioner to bribe the agent, resulting in petitioner's conviction and imprisonment therefor; and was this such an infringement of due process as to call for review and reversal by this Court?

Constitutional Provision and Statute Involved

Amendment V, United States Constitution:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .".

Title 18 U.S.C. § 201 (as in effect March 2, 1960):

> "§201. Offer to officer or other person.
>
> Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency . . . with intent to influence his decision or acting on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or, with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the com-

mission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both. . . . ."

Statement of the Case

Petitioner, Harold Kanter, was arrested on March 2, 1960 by U.S. Internal Revenue agents Raymond N. Kiely and Howard Moran, on a charge that petitioner paid a bribe of $100.00 to agent Kiely, in violation of 18 U.S.C. § 201 (21a-22a *).

The next day (March 3, 1960), petitioner was arraigned on the United States Attorney's complaint, before the U.S. Commissioner (69a). On November 2, 1962, the Grand Jury indicted petitioner on said charge of violation of 18 U.S.C. § 201 (1a). Petitioner then moved to dismiss the indictment for failure to accord him a speedy trial, which motion was denied by the district court on December 18, 1962 (1a-2a). The trial commenced on December 20, 1963, and petitioner was found guilty by the petit jury on December 26, 1963 (2a). On January 23, 1964, the trial court sentenced petitioner to a term of imprisonment of one year and one day, and entered judgment. On petitioner's appeal, the Court of Appeals affirmed judgment, in open court, on June 12, 1964. The aforesaid petition for rehearing was denied by the Court of Appeals on July 22, 1964.

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* References are to petitioner's appendix to his brief in the Court of Appeals, unless otherwise indicated.

Petitioner surrendered, and commenced serving his said sentence, on August 4, 1964.

The intent and design of agents Kiely and Moran to entrap the petitioner is established by the totality of their testimony, particularly about how they commenced their investigation of the petitioner's premises in anticipation of receiving a bribe. Agent Kiely, the protagonist, was armed with a Minifon recorder concealed on his person permitting the recording of two hours of conversation (28a-30a, 55a-56a, 114a-115a, 137a-138a). Agent Kiely turned over all of his money, and his wallet, to Agent Moran, to exclude possession of any money other than prospective bribe money (*Ibid.*) (71a-72a). The agents pre-arranged that if Kiely nodded his head it would indicate that he had been bribed (64a, 118a, 129a). In fact, this signal was used after the bribe, and it was so understood by agent Moran (*Ibid.*). Although the agents spoke of their inspection as "routine", it was not an ordinary inspection of a cabaret but an investigation of the allegations of petitioner's wife that all sorts of violations, particularly bribery of Revenue agent Victor Singer, were taking place (9a-11a, 34a, 34a-35a, 36a-39a, 49a-52a, 84a-96a, 113a-115a, 120a-122a, 123a, 137a-138a).

The agents had a definite expectation that they would be bribed; otherwise, they would have not gone as a team but would investigate alone (64a, 114a, 120a-122a, 137a-138a).

There was no evidence in the record as to any prior violations of the Internal Revenue alcohol laws or regulations or of the bribery statute (18 U.S.C. § 201) by the petitioner, his business (the E. J. H. Bar & Grill, Inc.,

operator of "The African Room"), or by its officers and principals (8a-9a, 34a-36a, 84a-86a, 92a-94a; 79a-80a). The agents commenced their investigation solely upon hearsay allegations reported to the Internal Revenue Bureau, and to the agents, by petitioner's estranged wife, with whom the petitioner was then having marital difficulties (48a-52a, 61a, 92a-96a, 101a, 122a, 123a).

Kiely said that his test indicated that there might be something wrong with six bottles tested by him (*Ibid.*, 19a, 63a, 74a, 91a), and consequently that he planned to remove several bottles for examination by a United States chemist (*Ibid.*) (35a).

Kiely, at several points in the record, noted to petitioner that his imputations of liquor adulteration could not be taken as definitive, and that only a Government chemist could make such determination for the Government (14a, 16a, 77a-78a, 116a, 127a).

Kiely asserted that the six bottles selected by him for removal were differentiated from fresh bottles either by differences in color or differences in proof (91a). No evidence was adduced to show that such differential indicated adulteration, or that differences could not occur between one bottle and another either due to chance variation among samples, differences in shipments and lots, or differences due to evaporation, exposure to air and aging, among other possible reasons. Kiely was not qualified by testimony to testify that the Williams Reagent Test was any indication of adulteration of liquor bottles; no expert qualifications as such were shown. Kiely had performed the Williams test on only one prior occasion, about two

years before the confrontation with petitioner herein (38a, 90a). The fact that Kiely could make a fluent presentation of the nature of the test, at the trial in December, 1963, does not show his understanding in March, 1960 (12a-13a).

It is evident that Kiely made a strong statement, that there was something patently wrong with petitioner's liquor bottles. Kiely intimated that the bottles he selected —about 15 to 20—had particularly mutilated or worn labels or soiled strip stamps (13a), and that his inconclusive test indicated that there was a difference in color (intimating a substitution of a cheap brand for an expensive brand) or off in proof (intimating dilution or other adulteration) (91a). The consistent pattern of testimony in the record shows that petitioner said that there was nothing wrong with the bottles, that he kept straight stock, and that he could not understand how anything could be wrong with the bottles (15a, 74a, 116a, 127a).

It is evident, indeed patent, that petitioner had a strong fear against having Kiely take away the six bottles he said he was going to take; in view of petitioner's repeated insistence and entreaty that Kiely should not take away the bottles (*Ibid.* 16a, 18a-19a, 77a-78a).

The true objective and intent of the government agents is to be clearly and unequivocally seen from the very statements they made to petitioner and his father after the appellant was arrested. These statements, as established by cross-examination, were in so many words: "What arrangement did you have with Vic Singer?"; "We didn't walk in here for nothing" (repeated with variations); "We ain't here because we like you"; "We are interested in

what transpired before"; and "We are not too concerned with tonight" (37a-39a). The latter statement is the most significant; the arrest was a means of exerting pressure upon the appellant to tell tales about Victor Singer (34a-39a, 81a-82a).

If the agents had any reason to believe that the petitioner's bottles were in fact adulterated, and that violations were being committed by him, his father, and their partner Joseph Genser, it is inconceivable that the agents would not take steps to investigate further, at least to the extent of summoning other agents or returning themselves to seal and take away any suspect bottles. As it happened, no bottles were sealed, and no bottles were removed (22a-23a, 34a-35a, 56a-57a). Thus did the Government lose its opportunity to complete an investigation of a case, if it ever did have a case. Without the completion of this investigation, the background of appellant's fear about his bottles can never be established. With the gaps in the record, no jury should have been called upon to speculate whether or not appellant had been entrapped; there were too many loose variables to permit this case to properly be submitted to a jury. There was no independent objective or subjective (expert) testimony indicating anything wrong with the bottles. There was nothing to indicate any course of negotiations or dealings between petitioner and Kiely (or with Singer or any other agents) that could demonstrate wilfulness and isolate to petitioner the source of the felonious intent and conduct: indeed, the fact that there was only one single encounter with the agents, which lasted less than one hour up to the point of arrest, demonstrates the opposite, that petitioner was frightened, oppressed and coerced by baseless allegations of adulteration that petitioner could

anticipate would lead to gross consequences regardless of truth or foundation. This Court is able to take judicial notice of the myriad of laws and regulations enforced by the State of New York and City of New York that respected hearsay allegations as well as those based upon evidence, and whose inspections, reports and administrative violations would have collateral repercussions. This made the petitioner a mark of less severe resistance than the average "reasonable man"; it would not establish the petitioner as one who is prone to give bribes to every inspector who came along, or to any in particular. Where no substantive violations by or imputable to petitioner have been shown, he should not be considered to have any guilty predisposition as to entitle the Government agents to engage in the aforesaid entrapment techniques which have resulted in his conviction.

The Minifon record presents its own problems: it did not record the entire conversation, but omitted the critical initial portion, which might have corroborated the fragmentary testimony of the agents (30a, 57a-58a, 73-74a; compare 15a, 116a). This Court should take notice of the inherent unreliability of a recording device with a wire that is easily erasable, as was noted in the minority opinion in *Lopez* v. *United States, supra,* 373 U.S. at 446, 467-468 and footnotes 14-17, inclusive, citing the experiments of Samuel Dash, Esq. and associates. In this case, wherein less than the total conversation was played to the jury, such evidence should be treated with skepticism.

Petitioner does not expect that the Government will contest the jurisdiction of this Court to consider this petition on the merits. However, petitioner desires to call to the Court's attention two cases in which this Court acted upon

determinations made by the Court of Appeals for the Second Circuit upon new matters raised upon petitions for rehearing. *Accord, Castle* v. *United States,* 287 F. 2d 657, 662 (5th Cir. 1961), judgment vacated 368 U.S. 13 (1961), indicating approval by this Court of a point raised for the first time upon a petition for rehearing filed in the Court of Appeals. See also *United States* v. *Rodiak,* 117 F. 2d 588 (2d Cir. 1941), rehearing denied, 120 F. 2d 760 (2d Cir. 1941), affirmed, 315 U.S. 783, (reh. den. 316 U.S. 707.

Reasons for Granting the Writ

I. The courts below, in sanctioning the jury's repeated hearing of a Minifon recording in which the petitioner could be heard making incriminating statements in his own voice, inflections and mannerisms, during petitioner's trial on a federal criminal charge in which the petitioner elected not to testify, countenanced an infringement of petitioner's Fifth Amendment right not to be a witness against himself.

In sanctioning the playing, and the repetition after the jury had retired, of a Minifon recording in which the petitioner made incriminating statements in his own voice, inflections and mannerisms, the courts below countenanced an infringement of petitioner's Fifth Amendment privilege not to be a witness against himself. Petitioner was a defendant in a criminal trial in the federal district court upon charges of violation of a federal bribery statute, 18 U.S.C. § 201. Petitioner had elected not to testify at this trial, and indeed, offered no evidence whatsoever. The playing of the Minifon recording to the jury made the petitioner an involuntary, and unwitting, witness against himself, and vitiated his election not to testify.

The playing of the Minifon recording made petitioner's election not to testify empty and fruitless, inasmuch as the jury nevertheless heard the *corpus delicti* in petitioner's own words and own voice. This recording was obtained without petitioner's knowing consent, and without any prior warning of his Constitutional right to remain silent under the circumstances. Compare *Massiah* v. *United States*, U.S. , 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964). The playing of the Minifon recording made petitioner, in effect, an involuntary witness against himself. The incriminating evidence was "taken from him by a contrivance of modern science." Black, J., concurring in *Rochin* v. *People of California*, 342 U.S. 165 (1952) at 174, 175. These were "words taken from his lips". Douglas, J., concurring, *Ibid.* 342 U.S. at 177, 179.

The absence of any Minifon recording of the beginning portion of the agent Kiely's conversation with the petitioner, wherein the agent stated that he thought that six bottles were off in color or proof, and should be sent down to be tested by a Government chemist, should be scrutinized by this Court. Kiely had set down these bottles on the counter, and before the petitioner approached, Kiely knew, or must have anticipated, that the conversation would, as it did, relate to the bottles. The agents had anticipated and expected a bribe (64a-65a). Agent Kiely came "loaded for bear" by having a Minifon and being divested of all money so that he and agent Moran, could be prepared to effect an arrest upon any offer of a bribe (28a-30a, 64a-65a, 71a, 114a-115a, 137a-140a). Agent Kiely thus had to expect and anticipate that at the time petitioner approached him, a bribe could then be forthcoming. The explanation that agent Kiely was trying to save the Minifon's battery (and, infer-

entially, its two-hour recording time-limit) could hardly excuse him for not having the recorder on at this critical juncture. Conversely, if two hours were needed the petitioner might well be beyond persuasion. It is all too easy for Government agents to shape their testimony to conform to the electronic record they have preserved, to afford them an easy excuse for their failure to record an earlier part of a conversation which might establish the petitioner's innocence and the agent's provocation while putting into evidence the latter, apparently incriminating part.

Petitioner further contends that the district Court committed plain error, cognizable by this Court notwithstanding the failure of petitioner's counsel to make proper objection at the trial, since the petitioner was substantially damaged by the jury's repeated hearing of his voice, inflections and mannerisms setting forth the *corpus delicti* of the crime. Petitioner submits that the introduction of the Minifon recording on the Government's principal case, (as against its possible use on rebuttal had petitioner elected to testify) effected a substantial abridgement of petitioner's Fifth Amendment privilege not to "be compelled in any criminal case to be a witness against himself." The Government could have rested content with the testimonial evidence of its witnesses, and thereby have precluded any breach of petitioner's privilege of silence.

While analogous Constitutional issues, based principally upon claims of infringement of rights under the Fourth Amendment, were considered and discussed in *Lopez* v. *United States*, *supra*, 373 U.S. 427 (1963), it is submitted that the within contentions were neither treated nor foreclosed by the Court's reasoning stated at 373 U.S. at pages 440-441. This Court should give due consideration to the

erosion of the defendant's privilege of silence, purportedly protected by the abovementioned clause of the Fifth Amendment, where the Government is able to introduce into evidence such a recording on its case in chief and the defendant elects not to testify.

II. The trial court committed plain error, depriving petitioner of due process, in not precluding the jury from hearing the petitioner's voice, inflections and mannerisms on a Minifon recording wherein petitioner unfolded the *corpus delicti* of the federal offense involved in the trial, by reason of the circumstances shown in the record.

The admissibility of a Minifon recording or other such record may not properly rest upon any *a priori* conclusion that a Minifon recording is admissible because it represents the defendant's wilful act. Such reasoning overlooks the important consideration that any issue of entrapment as a matter of fact creates the same problem as is involved where there is an issue as to the voluntariness of a confession offered in evidence. A recording of the defendant's voice, inflections and mannerisms, making incriminating statements and setting forth the *corpus delicti* of a crime, is so nearly the equivalent of a confession as to call for similar safeguards and similar treatment. The presence of any factual issue as to inducements, coercion, oppression or provocation, as may be involved in any claim of entrapment, should require any such recording to be subjected to the same considerations and tests as if it were a confession.

In *Wilson* v. *United States,* 162 U.S. 613, 621-622 (1896), this Court held that out-of-court statements showing essential elements of crime have the same possibilities for error as confessions, and should be tested and treated by the same standards as confessions. The language of this Court

in *Bram* v. *United States*, 168 U.S. 532, 544 (1897) points to some comparable considerations herein:

> " . . . if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, . . ." (caused the States to make a denial of the right to question an accused person a part of their fundamental law).

Where there is any factual issue as to entrapment, the Court must determine whether or not the content of the Minifon recording was not rendered inadmissible by any such inducements, coercion, oppression or provocation as may have been elements of the entrapment, and which may thus have vitiated the voluntariness of the recorded statement. Compare *McNabb* v. *United States*, 318 U.S. 332 (1943) and authorities cited therein, *Spano* v. *People of the State of New York*, 360 U.S. 315, 320-324 (1959), and footnote 2, page 321, *Ibid.* This Court has recently scrutinized the problem of the competence of the jury to determine both the voluntariness and the reliability of a confession, *Jackson* v. *Denno*, U.S. , 32 U.S. Law Week 4620 (June 22, 1964).

In *Lopez* v. *United States*, 373 U.S. 427 (1963), the problem of possible involuntariness of a Minifon recorded statement of a defendant was precluded by this Court's finding that the record showed no substantial issue as to entrapment. 373 U.S. at pages 434-436. Petitioner submits that the circumstances of the within case as to the

issue of entrapment diverge sharply from those of *Lopez*. Petitioner submits that the existence of at least a factual issue of entrapment in the within case creates a Constitutional issue of deprivation of due process inherent in the use of a recording which may amount to an involuntary statement within the meaning of the cases cited above.

III. The district court's refusal to grant petitioner's motion for acquittal on the basis of entrapment as a matter of law, and the affirmance of said ruling by the Court of Appeals, tended to deprive petitioner of due process where petitioner's conviction resulted from the agent's unfounded imputations as part of a course of provocative conduct designed to and which did induce petitioner to offer a bribe to him.

There is a critical issue of law as to entrapment herein. There is no evidence in the record showing that petitioner ever committed any previous violations or that any actual violations of alcohol statutes or regulations or any bribery had in fact occurred. The Government agents relied entirely upon the untested hearsay statements of petitioner's estranged wife (based upon her alleged conversations with appellant, his father and their partner), and not on any observations or any independent information. Such statements were not evidence of the existence of any such violations. The Government agents lost any opportunity they might have had to prove any such violations by not completing their investigation of petitioner's business premises. The entrapment, as claimed, occurred on the first visit of the investigating agents. There was no course of meetings whereby the defendant could be isolated as the source and moving force in offering the bribes. In these respects, among others, this case differs markedly

from *Lopez* v *United States*, 373 U.S. 427 (1963); see also *United States* v. *Kabot*, 295 F. 2d 848 (2d Cir. 1961), *cert. denied*, 369 U.S. 803 (1962).

This is an unusual type of entrapment case, differing from the standard case wherein the agent purports to be a seller, purchaser or other collaborator in some kind of criminal enterprise and holds out inducements to the defendant to participate in a transaction in contraband such as narcotics, bootleg liquor or smuggled goods. As petitioner contends herein, the entrapment consisted of provocation and coercion in the form of an Internal Revenue agent's unfounded charges that the liquor in petitioner's night club (in the middle of New York City) was adulterated. Such charges, even if unproven, could have damaged or injured severely the licensing status of petitioner's premises under Federal, New York State and New York City laws, license regulations, and unwritten administrative practices of the various government agencies involved.

The record does not show any evidence of past or existing violations at petitioner's premises, or any record of past violations by petitioner as might privilege Government agents to engage in entrapment maneuvers with impunity. The agents never availed themselves of a clear opportunity to remove purportedly suspected bottles from petitioner's premises, and thus lost any chance of proving the existence of substantive violations that might establish a predisposition on petitioner's part. Since petitioner was entitled to any available presumption of innocence, it is submitted that petitioner shows entrapment as a matter of law where, lacking any evidence of any substantive violations, the agent's unsupported imputations of liquor

adulteration provoked and induced petitioner to eagerly pay a bribe of $100.00 to the agent who thereupon arrested petitioner. Petitioner is entitled not to be treated as an unwary criminal eager to participate in a collusive transaction with a Government agent, but rather should be treated as an unwary innocent.

The Government should not be heard to suggest that petitioner's bribe impeded the Government agents from obtaining evidence as to possible liquor adulteration or any other Internal Revenue violations. The Government must be charged with its failure to utilize its vast resources, its army of agents and experts, to gather such evidence, with the benefit of the statutory consent for such search and seizure that is requisite for a cabaret premises licensed under the Federal, State and local liquor laws.

An important determinative criterion in bribery cases involving entrapment is whether the desire and intent to bribe originates with the defendant or with government agents. Demonstrated existence of violations of law, and the repeated contacts between agents and defendants creating a course of dealings to isolate the defendants as the sources and moving forces in offering the bribes, are significant factors.

In *Sherman* v. *United States,* 356 U.S. 369, 372 (1958), this Court stated that "to determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent, and the trap for the unwary criminal." Previously, in *Sorrells* v. *United States,* 287 U.S. 435 (1932) this Court held that there is a distinction between instigation on the part of government officials and

their mere affording of apparent opportunities or facilities to violators.

In *Lopez* v. *United States, supra,* 373 U.S. 427 at 429-432, 436 (1963) an Internal Revenue Agent, Davis, repeatedly saw advertisements regarding dancing, singing and entertainment at defendant's restaurant-bar-lounge. Davis personally observed dancing on defendant's premises. Davis' audit of the defendant's records, and the defendant's admissions, established that he had not been paying the federal excise tax of 10% on cabaret receipts, and that he had no intent to pay such tax. On October 21, 1961, the defendant had paid a bribe of $420.00 to Davis.

On October 24, 1961, the agent was armed with a Minifon recorder, which transcribed a conversation during which the defendant voluntarily gave the agent an additional $200.00 and promised him additional amounts in the future, whereupon the defendant was arrested. In affirming the defendant's conviction, this Court declared that "upon any reasonable assessment of the record, it seems manifest that all that Davis was doing was to afford an opportunity for the continuation of a course of criminal conduct, upon which the [defendant] had earlier voluntarily embarked, under circumstances susceptible of proof." (373 U.S. at page 436).

The entrapment maneuver operated by means of hostile provocation in the form of a baseless accusation, coupled with the means of jeopardizing the petitioner's business. This Court should take notice of the complexity of licensing provisions, regulations and administrative practices of the State of New York Liquor Authority and the License Division of the New York City Police Department (in 1960) whereby even disproven or unproven

charges could be the cause of a license revocation or devastating suspension, and to recognize the context of the coercion and oppression involved in the accusation.

The fact that the petitioner did offer and tender the bribe cannot give rise to any inference to close the gaps in evidence once the entrapment defense is raised, since this would itself beg the entrapment issue.

Petitioner submits that the courts below sanctioned a deprivation of due process in denying petitioner a directed judgment of acquittal. The record does not show that petitioner was an unwary criminal, privileging the Government to engage in entrapment maneuvers with impunity under the doctrine of the majority views in the abovementioned cases. In absence of evidence of past or present violations at petitioner's premises, and the failure of the government agents to have any of the bottles at said premises to be tested at *any* time to establish substance or reasonable basis for the agents' imputations of adulterated liquor, it is submitted that entrapment was shown as a matter of law where a bribe followed upon a Government agent's unsupported, and consequently baseless, imputations and accusations of liquor adulteration. The failure of the courts below to recognize the applicable distinctions in the considerations involved, and the resultant denial of due process to petitioner, calls for the exercise of this Court's supervisory powers over federal tribunals.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

IRWIN L. GERMAISE,
Attorney for Petitioner,
217 Broadway,
New York 7, N. Y.

BERNARD B. POLAK,
Of Counsel.

Dated: New York, New York
August 11, 1964

APPENDIX A

Order and Judgment of the Court of Appeals, June 12, 1964

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of June one thousand nine hundred and sixty-four.

Present:

HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. THURGOOD MARSHALL,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HAROLD KANTER,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Appendix A—Order and Judgment of the Court of Appeals, June 12, 1964

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO

Clerk

APPENDIX B

Order of the Court of Appeals, July 22, 1964, Denying Petition for Rehearing In Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of July, one thousand nine hundred and sixty-four.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. THURGOOD MARSHALL,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HAROLD KANTER,
Defendant-Appellant.

A petition for a rehearing in banc having been filed herein by counsel for the appellant,

Appendix B—Order of the Court of Appeals, July 22, 1964, Denying Petition for Rehearing In Banc

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO
Clerk

By /s/ VINCENT A. CARLIN
Chief Deputy Clerk

Office-Supreme Court, U.S.
FILED
SEP 11 1964
JOHN F. DAVIS, CLERK

No. 378

In the Supreme Court of the United States

OCTOBER TERM, 1964

HAROLD KANTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
HERBERT J. MILLER, Jr.,
Assistant Attorney General,
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys,
Department of Justice,
Washington, D.C., 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 378

HAROLD KANTER, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* order of the court of appeals (R. [illegible];[1] Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered [illegible] June 12, 1964 (R. 164, Pet. App. A). A petition [illegible] rehearing *en banc* (R. 192–217) was denied on [illegible]y 22, 1964 (R. 253, 255; Pet. App. B). Mr. Justice [illegible]dberg extended the time for the filing of a petition [illegible] a writ of certiorari to and including August 11, [illegible], and the petition was filed on that date. The

[1] "R." designates petitioner's appendix in the court of appeals, [illegible]pplemented by the proceedings in that court.

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jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the introduction into evidence of the Minifon recording of petitioner's offer of a bribe to an Internal Revenue agent violated petitioner's privilege against self-incrimination.

2. Whether there was entrapment as a matter of law.

3. Whether the admissibility of evidence of petitioner's offer of a bribe should have been tested under standards applicable to confessions.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of unlawfully giving a bribe ($100.00) to an agent of the Internal Revenue Service with intent to influence the agent in the exercise of his official conduct, in violation of 18 U.S.C. 201 (R. 4–5, 157). Petitioner was sentenced to imprisonment for one year and a day (R. 160–161). The court of appeals unanimously affirmed (R. 164; Pet. App. A).

The evidence adduced at trial may be summarized as follows:

In the early evening of March 2, 1960, two agents (Kiely and Moran) of the Internal Revenue Inspection Service entered a bar in New York City known as the "African Room" (R. 9–10; 115). A "facet" of the agents' purpose in making this visit was to conduct a retail liquor dealer's inspection to deter-

mine if any adulterated liquor was being sold on the premises (R. 88). The overall purpose was to "check out" information received by the agents that violations of the liquor laws had occurred in the "African Room" and that petitioner and others had, in the past, bribed Internal Revenue agents (R. 34–37, 85–88; 120–121).

Agent Moran entered the premises first and took a seat at the bar (R. 10, 115). About five minutes later agent Kiely entered and told petitioner—who had approached and asked the agent if he could help him—that he was an Internal Revenue agent and was there to conduct a retail liquor dealer's inspection (R. 10–11, 55; 69; 115–116).[2]

After inspecting about fifteen or twenty bottles of liquor chosen at random, agent Kiely told petitioner that he wanted to take six bottles which he had reason to believe should be analyzed by a United States Chemist (R. 14, 16, 19, 35; 116).[3] Petitioner told Kiely that he did not understand how anything could be wrong with the bottles. Petitioner then went over to speak to his father, seated at the other end of the bar, who "passed something" to him (R. 15, 117). On petitioner's return, he asked the agent to accompany

[2] Such an inspection is conducted by introducing a chemical substance, known as "Williams Reagent," into the alcohol which discloses the alcohol's proof and whether any coloring has been added (R. 12–14).

Agent Kiely testified that the inspection was "[v]ery simple" to perform and that he had made one in a previous case about two years before (R. 90).

[3] Agent Kiely testified that samples from these six bottles revealed that the liquor was "either off in color or in proof" (R. 91).

him downstairs to the storeroom where the liquor was kept (*ibid.*).

As he followed petitioner downstairs, agent Kiely activated a Minifon recording device concealed on his person and commenced to record his conversation with petitioner (R. 28, 30, 57, 60). The recording was introduced into evidence by the government and played for the jury (R. 33). Agent Kiely testified that the Minifon was not activated earlier because he wanted to "conserve the battery power", that he had no idea how long the subsequent conversation with petitioner would last, and that while he was upstairs conducting the tests on the liquor there was no conversation to record (R. 57–58, 84).

When they arrived in the storeroom, petitioner told agent Kiely that he could not understand how anything could be wrong with the liquor and that he was a "very close personal friend" of Vic Singer[4] (R. 15–16). Petitioner then asked the agent not to take any bottles from the premises. Kiely explained that his doing so was no indication of wrongdoing, but meant simply that the agent wanted the expert opinion of a United States Chemist (R. 16, 19). At this juncture, petitioner "slid across the packing table" to the agent five twenty-dollar bills, saying: "That is for you. Don't take the bottles" (R. 18, 16–17). When Agent Kiely responded that this was "risky business", petitioner assured him that nobody would ever find

[4] Singer was an investigator of the Alcohol and Tobacco Tax Division (R. 16). Agent Kiely had information that Singer had previously been bribed by the petitioner (R. 34–36, 86, 120–121).

out and that Vic Singer would vouch for him (R. 18–19). The agent took the money [5] and the two men went back upstairs (R. 19, 23). Shortly thereafter, agent Kiely, without taking the bottles with him, left the premises, nodding to agent Moran on his way out (R. 20, 117–118). Some fifteen or twenty seconds later, agent Kiely returned and placed petitioner under arrest for bribery (R. 21, 118).

ARGUMENT

The instant case is virtually indistinguishable from *Lopez* v. *United States*, 373 U.S. 427, and does not call for further review.

1. There is no substance to petitioner's argument that the playing of the Minifon recording of his conversation with agent Kiely had the same legal effect as if he had been forced to testify against himself at trial and thus violated his privilege against self-incrimination. Just as agent Kiely—or any one else—could testify to petitioner's incriminating words and the deeds with which he was charged, so could a recording of the conversation be introduced into evidence to corroborate the agent's testimony. Indeed, as this Court recognized in *Lopez* v. *United States, supra*, 373 U.S. at 439, such a recording is "the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose." [6]

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[5] Prior to going to the "African Room", agent Moran had searched agent Kiely and removed all the money he then had on his person (R. 29–30; 114–115).

[6] Petitioner (Pet. 12–13) seeks to draw a sinister inference from the fact that Agent Kiely did not record his conversation

2. Petitioner's contention that he was entrapped as a matter of law is baseless. The record shows that the agent did not, either directly or by implication, ask for or suggest a bribe. That the agent informed petitioner that he wanted to take certain bottles of liquor for testing by a government chemist, simply indicates that he was carrying out his duties [7] and not, as petitioner would have it, that he was engaged in "a baseless accusation," (Pet. 19) to prompt a bribe offer. There was not even a factual issue of entrapment, let alone entrapment as a matter of law. In any event, the trial judge in his instructions submitted the issue of entrapment to the jury (R. 149–150) and no exception was taken to his charge (R. 154).

3. Equally groundless is petitioner's claim—which assumes that there was a real entrapment issue—that the admissibility of the recording of petitioner's offer of the bribe should have been tested under the same standards as if it were a confession. Petitioner's offer to the agent was not a confession; it was the very activity which constituted the crime. Whether in the form of Agent Kiely's testimony, or in petitioner's own words as contained on the wire recording of the conversation, these statements were properly introduced into evidence.

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with petitioner before they went down to the storeroom. But as the agent fully explained, he was desirous of conserving battery power and while they were upstairs there was no conversation to record (See R. 57–58, 84; Statement, *supra*, p. 4).

[7] Agent Kiely testified that he advised petitioner that removal of the liquor for further testing did not constitute a charge that the liquor had been adulterated (R. 16, 19).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

SEPTEMBER 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964